

CONTINUED PARTICIPATION OF SENIOR JUDGES IN AN IN
BANC PROCEEDINGS

JULY 23, 1996.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 531]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the Act (S. 531) to authorize a circuit judge who has taken part in an in banc hearing of a case to continue to participate in that case after taking senior status, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the Act do pass.

CONTENTS

| | Page |
|---|------|
| Purpose and Summary | 1 |
| Background and Need for Legislation | 2 |
| Hearings | 2 |
| Committee Consideration | 2 |
| Vote of the Committee | 2 |
| Committee Oversight Findings | 3 |
| Committee on Government Reform and Oversight Findings | 3 |
| New Budget Authority and Tax Expenditures | 3 |
| Congressional Budget Office Estimate | 3 |
| Inflationary Impact Statement | 4 |
| Section-by-Section Analysis | 4 |
| Changes in Existing Law Made by the Bill as Reported | 4 |

PURPOSE AND SUMMARY

S. 531 corrects a minor flaw in the Judicial Code, specifically 28 U.S.C. 46(c), by clarifying that active judges who take senior status while an in banc case is pending may continue to participate in the pending in banc case.

BACKGROUND AND NEED FOR THE LEGISLATION

S. 531 was introduced by Chairman Hatch of the Senate Judiciary Committee, and was cosponsored by the senior senator from Illinois, Paul Simon. S. 531 passed the Senate by unanimous consent on September 28, 1995.

Under the current version of 28 U.S.C. §46(c), a senior judge may participate in an in banc court when that court is reviewing a decision of a three-judge panel on which the senior judge sat. However, if a judge is in active service when an in banc court takes a case, but takes senior status while the case is pending, the law is unclear as to whether the senior judge may continue to participate in the in banc case. The Fifth Circuit held in 1968 that the senior judge may continue to participate. *United States v. Cocke*, 399 F.2d 433, 435 n.* (5th Cir. 1968) (in banc). On the other hand, the Seventh Circuit held in 1994 that the senior judge could not continue to participate. *United States v. Hudspeth*, 42 F.3d 1013 (7th Cir. 1994) (in banc). In *Hudspeth*, the Seventh Circuit recommended that we address this problem through legislation. 42 F.3d at 1015.

S. 531 will resolve this minor flaw in the statute by clarifying that the senior judge can continue to participate. It will eliminate any possibility of an in banc opinion's being held up because of the effect of a vote from a judge who may be near the time to take senior status. The Committee is informed that the Judicial Conference supports S. 531, and it is not aware of any opposition to it.

HEARINGS

The Committee held no hearings on S. 531, because it was viewed as noncontroversial and received broad bipartisan support.

COMMITTEE CONSIDERATION

On July 16, 1996, the full Committee met in open session and ordered favorably reported the bill S. 531, by a vote of 24 to 0, a quorum being present.

VOTE OF THE COMMITTEE

1. The motion to report favorably S. 531 without amendment. The motion was agreed to by a roll call vote of 24 to 0.

AYES

NAYS

Mr. Hyde
 Mr. Moorhead
 Mr. McCollum
 Mr. Gekas
 Mr. Coble
 Mr. Smith of Texas
 Mr. Schiff
 Mr. Canady
 Mr. Goodlatte
 Mr. Buyer
 Mr. Hoke
 Mr. Bono
 Mr. Heineman
 Mr. Conyers
 Mrs. Schroeder
 Mr. Frank
 Mr. Reed
 Mr. Nadler
 Mr. Scott
 Mr. Watt
 Mr. Becerra
 Ms. Lofgren
 Ms. Jackson Lee
 Ms. Waters

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, S. 531, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 19, 1996.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 531, an act to authorize a circuit judge who has taken part in an en banc hearing of a case to continue to participate in that case after taking senior status, and for other purposes, as ordered reported by the House Committee on the Judiciary on July 16, 1996. CBO estimates that enacting S. 531 would not result in any cost to the federal government. Because enactment of S. 531 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

S. 531 would clarify current law to confirm that judges who take on senior status may continue to participate in en banc hearings, which are hearings where all of the judges of a circuit court generally participate. According the administrative Office of the United States Courts maintaining the judges who are on senior status for inclusion in such cases would impose no additional costs on the courts because the pay and support resources for these judges would not change under this act. Thus, CBO estimates that enacting S. 531 would result in no significant impact on the federal budget.

S. 531 contains no private-sector or intergovernmental mandates as defined in Public Law 104-4 and would have no impact on the budget of state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director.)

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that S. 531 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1. S. 531 consists of one section which amends 28 U.S.C. § 46(c) to clarify that a United States Circuit Judge who begins participation in an in banc case while in active service may continue to participate in the decision of the case if the judge takes senior status during the pendency of the case.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 46 OF TITLE 28, UNITED STATES CODE

§ 46. Assignment of judges; panels; hearings; quorum

(a) * * *

* * * * *

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) *to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc time when such judge was in regular active service.*

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